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Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 621

HENRY LEVAUR, INC., COLT-BRADY COMPANY, AND BRADBURN MOTORS COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION AND SUPPORTING BRIEF.

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INDEX.

	Page
Petition	1
Questions presented	2
Statutes involved	3
National Labor Relations Act	3
Commerce	3
Affecting commerce	3
Prevention of unfair labor practices	3
Board petitions to Circuit Courts of Appeal or District Courts—findings of facts, conclusive—additional evidence—appeals	4
Petition for review by an aggrieved party—copy of petition to the Board	5
Statement	6
Complaint	6
Answer	7
Hearings	7
Board's decision and order	8
Opinion and judgment of the Circuit Court of Appeals for the First Circuit	9
Petitioners' contentions	17
Reasons for granting the writ	19
Brief	22
Opinions	22
Jurisdiction	22
Questions presented	22
Statutes involved	22
Statement	22
Errors to be relied upon	22
Summary of argument	23
Argument	23
Point I	23
Point II	24
Point III	26

Page

Point IV 27
Point V 28
Point VI 30
Conclusion 31

TABLE OF AUTHORITIES CITED.

Associated Press v. National Labor Relations Board, 301 U.S. 103 23
Carter Carburetor Mining Corp. v. Federal Trade Commission, 112 F. (2d) 722 15
Clover Fork Coal Co. v. National Labor Relations Board, 97 F. (2d) 331 15, 16, 18
Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 13, 15, 16, 18, 27
Consumers Power Co. v. National Labor Relations Board, 113 F. (2d) 38 16, 29
Currin v. Wallace, 306 U.S. 1 15
Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 15
Denver Automobile Cases, 10 N.L.R.B. 1173 24
Lemke v. Farmers Grain Co., 258 U.S. 50 15
McCall v. California, 136 U.S. 104 16
National Labor Relations Board v. A. S. Abell Co., 97 F. (2d) 951 14, 18
National Labor Relations Board v. Bradford Dyeing Association, 310 U.S. 318 16, 18, 28
National Labor Relations Board v. Cowell Portland Cement Co., 108 F. (2d) 198 14
National Labor Relations Board v. Fainblatt, 306 U.S. 601 15, 16, 29
National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 27
National Labor Relations Board v. Gerling Furniture Mfg. Co., 103 F. (2d) 663 10n.

Page

National Labor Relations Board v. Hearst et al. (C.C.A. 9, 1939) 29
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 14, 15, 25, 27
National Labor Relations Board v. Norfolk Shipbuilding & Dry Dock Corp., 109 F. (2d) 128 14, 18
National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 24
National Labor Relations Board v. Pure Oil Co., 103 F. (2d) 497 10n.
National Labor Relations Board v. Sunshine Mining Co., 110 F. (2d) 780 15
Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board, 101 F. (2d) 841, rev'd on other grounds, 308 U.S. 241 14, 18
North Whittier Heights Citrus Assoc. v. National Labor Relations Board, 109 F. (2d) 76 16
Santa Cruz Co. v. National Labor Relations Board, 303 U.S. 453 14, 15, 16, 18, 27
Schechter Poultry Corp. v. United States, 295 U.S. 495 23
Shierbrock Motors, In re, 15 N.L.R.B. 120 24
Southern Colorado Power Co. v. National Labor Relations Board, 111 F. (2d) 539 16
S. S. Kresge Co. v. Amsler, 99 Fed. 503 27
Texas N. O. R. Co. v. Brotherhood of Railway Steamship Clerks, 281 U.S. 548 23
Virginian Ry. v. System Federation No. 40, 300 U.S. 515 16, 23
Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142 24

National Labor Relations Act, Section 2 (6) 7
National Labor Relations Act, Section 2 (7) 7, 10
National Labor Relations Act, Section 8 (1) and (5) 7

Page

National Labor Relations Act, Section 10 (a) 10
National Labor Relations Act, Section 10 (c) (49 Stat. 453, 29 U.S.C. sec. 160 (c)) 9
National Labor Relations Act, Section 10 (e) 9, 22
National Labor Relations Board's Rules and Regulations—Series 1, as amended, Article II, Section 37 (b) 7
National Labor Relations Board's Rules and Regulations—Series 2, Article II, Section 36 8
Senate Committee Report No. 572 25

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v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Henry Levaur, Inc., Colt-Brady Company, and Bradburn Motors Company, pray that a writ of certiorari be issued by this Court to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above-entitled cause on October 25, 1940, enforcing an order of the National Labor Relations Board.

Questions Presented.

1. Whether the petitioners, by purchasing commodities for resale in the State of Rhode Island, even though the said commodities are sent into the State of Rhode Island from other States and resold in the State of Rhode Island, are engaged in interstate commerce, within the meaning of the National Labor Relations Act.

2. Whether in the absence of an effect upon interstate commerce and the absence of sufficient facts supported by evidence that certain unfair labor practices as alleged might lead or tend to lead to labor disputes, the National Labor Relations Board, by virtue of its authority as derived from the National Labor Relations Act, has jurisdiction to issue an order against the petitioners.

In other words, are the facts as found by the National Labor Relations Board that the respondents (petitioners here) are engaged in interstate commerce without showing an effect upon that commerce sufficient to enable it to enter an order against the petitioners to cease and desist from alleged unfair labor practices?

This question was answered in the affirmative by both the National Labor Relations Board (R. 317-339) and the Circuit Court of Appeals for the First Circuit(*infra*, p. 9), each of those tribunals having adopted the view that the National Labor Relations Act applies to the businesses of the petitioners as conducted, and therefore falls within the jurisdiction of the National Labor Relations Board.

The petitioners contend that the test of the Board's jurisdiction is in the existence of a relationship of an employer and his employees to the commerce in such a manner that unfair labor practices, if committed, will lead or tend to lead to a labor dispute burdening or obstructing commerce, and since it will be noted that in the cases at bar no effect upon commerce existed to support the Board's find-

ings of fact, the National Labor Relations Board, it is submitted, exceeded its authority in directing an order against them.

Statutes Involved.

NATIONAL LABOR RELATIONS ACT.

(Public Act No. 198, 74th Congress, approved July 5, 1935.)

Commerce.

Section 2:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Affecting Commerce.

Section 2:

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Prevention of Unfair Labor Practices.

Section 10:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Board Petitions to Circuit Courts of Appeal or District Courts—Findings of Facts, Conclusive—Additional Evidence—Appeals.

Section 10:

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered

by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 346 and 347).

Petition for Review by an Aggrieved Party—Copy of Petition to the Board.

Section 10:

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been

engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Statement.

COMPLAINT.

Charges and amended charges having been filed by the International Association of Machinists, Local No. 1017, a labor organization herein referred to as the I.A.M., the Board, by its Acting Regional Director at Boston, Massachusetts, on June 21, 1939, issued its complaints against respondents* in three separate proceedings (R. 9-14, 23-28, 34-39). In each instance the complaint alleged that the I.A.M. had been designated as their collective bargaining

*Petitioners here, where respondents appear throughout in Complaint and Board's Decision and Order.

representative by a majority of the employees in an appropriate unit, and that the respondent, by refusing to bargain collectively with the I.A.M. and by other conduct which interfered with, restrained, and coerced its employees in the exercise of their right to self-organization, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act (R. 9-12, 23-26, 34-37). Each complaint also alleged that, because of the respective respondent's refusal to bargain, the I.A.M. called a strike against respondent on or about May 1, 1939, and that this strike still continued (R. 11, 25, 36).

The complaints, together with notices of hearing, were served upon respondents and the I.A.M. (R. 12-13, 26-27, 37-38, 298, 303, 308). Thereafter the Board, acting pursuant to Article II, Section 37 (b) of its Rules and Regulations—Series 1, as amended, ordered that the three proceedings be consolidated (R. 16, 299, 304, 308).

Answer.

In answer to the complaint, the respondents denied, in each instance, a commission of the unfair labor practices as alleged; the applicability of the Act to their operations; and that they were engaged in interstate commerce within the meaning of the Act (R. 18-21, 30-33, 41-44, 299, 304, 308).

Hearings.

Pursuant to amended notices (R. 17), a hearing was held at Providence, Rhode Island, in July, 1939, before a trial examiner designated by the Board (R. 21-22), each respondent being represented by counsel and participating in the hearing. On September 7, 1939, respondents, the I.A.M.,

and a representative of the Board entered into three separate stipulations (R. 298-302, 303-307, 307-311). By the terms of these stipulations, each respondent expressly consented to the issuance of an order by the Board and, upon application by the Board, to the enforcement of such order by the appropriate Circuit Court of Appeals, requiring it in stated terms to cease and desist from certain unfair labor practices and to take certain affirmative action, subject only to the right of respondent "to contest before the National Labor Relations Board and any appropriate court the applicability of the National Labor Relations Act to respondent and the employees of respondent, and by reason of the aforesaid jurisdiction of the National Labor Relations Board and appropriate Circuit Court of Appeals to enter against the respondent the order and decree" provided in the stipulations (R. 301, 306, 311). Thereafter, on October 3, 1939, the Board issued its order approving the three stipulations and transferring and continuing the consolidated cases before the Board, in accordance with the stipulations and pursuant to Article II, Section 36, of the Board's Rules and Regulations—Series 2 (R. 312-313).

Oral argument was had before the Board in Washington, D.C., on October 26, 1939, both respondents and the I.A.M. participating (R. 314-316). Thereafter, on November 28, 1939, the Board issued its Decision, setting forth its findings of fact, conclusions of law, and order (R. 316-340).

Board's Decision and Order.

The Decision and Order of the National Labor Relations Board is reported in full in the record on pages 317-339.

Upon the findings made therein, the Board concluded that the Act is applicable to the operations of each respondent and issued an order against each in the form provided in the stipulations dated September 9, 1939 (R. 298-311).

OPINION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MAHONEY, J. These consolidated cases are before this court upon petition of the National Labor Relations Board for the enforcement of an order issued against respondents pursuant to Section 10 (c)[1] of the National Labor Relations Act (49 Stat. 453 (1935), 29 U.S.C. § 160 (c) (Supp. 1938)). The jurisdiction of this court is derived from Section 10 (e)[2] of the same statute.

Each of the three respondents is a Rhode Island corporation engaged in the distribution, servicing, and repair of motor vehicles in Providence, Rhode Island, where the alleged unfair labor practices were found to have occurred. Charges were filed against each respondent by the International Association of Machinists, Local No. 1017, and the Board issued complaints charging the respondents with identical unfair labor practices. The three proceedings were thereafter consolidated, and the respondents filed answers denying the jurisdiction of the Board on the ground that they were not engaged in interstate commerce,

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[1] "(c) Reduction of testimony to writing; findings and orders of the Board. . . . If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. . . ."

[2] "(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any circuit court of appeals of the United States . . . for the enforcement of such order. . . . Upon such filing, the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, . . ."

and denying the commission of the unfair labor practices alleged.

At the hearing before the trial examiner, all the parties entered into stipulations consenting to the entry of an order by the Board, and a petition to the Circuit Court of Appeals for its enforcement, requiring the respondents to cease and desist from the unfair labor practices charged and ordering certain affirmative action subject only to respondents' right to contest the jurisdiction of the Board.[3]

After hearing and argument, the Board issued findings of fact and conclusions of law and held that the respondents' operations constituted a continuous flow of commerce, and, therefore, were subject to the National Labor Relations Act. The Board entered the order agreed upon and has petitioned this court for enforcement. Thus, the only question before us is whether the respondents are engaged in interstate commerce or whether their unfair labor practices so "affect commerce" within the meaning of Section 10 (a)[4] of the National Labor Relations Act, *supra,* as defined in Section 2 (7)[5] of the statute.

Amply supported by uncontradicted evidence, the Board found that all three respondents are engaged in the sale, distribution, exchange, service and repair of new and used

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[3] Such stipulations have been several times upheld. See *e.g., National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C.C.A. 7th, 1939); *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497 (C.C.A. 5th, 1939).

[4] "(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

[5] "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

automobiles, and parts thereof. The general operations of the respondents as distributors or dealers was described as follows:

Each respondent has an agreement with a manufacturer of automobiles for the sale and distribution of the latter's automobiles within a certain sales area. These areas are not necessarily confined to any particular state. Distributors, such as the respondents, appoint dealers to represent them within their designated sales areas. Respondent Bradburn Motors Company is a distributor and dealer in automobiles, parts, accessories and equipment manufactured by the Pontiac Motor Division of the General Motors Sales Corporation, and is represented by ten Rhode Island dealers and one Massachusetts dealer. Colt-Brady Company is a distributor of and dealer in automobiles, parts, accessories and equipment manufactured by the Chrysler Corporation of Detroit, Michigan, and has seventeen Rhode Island and three Connecticut dealers. Henry Levaur, Inc. is a distributor of and dealer in automobiles, parts, accessories and equipment manufactured by the Chrysler Corporation of Detroit, Michigan, for its Desoto Division, and has thirteen dealers in Rhode Island and three in Massachusetts.

The dealers purchase from the distributors the products of the manufacturer for resale, and furnish reports of their operations to the distributors who in turn report to the manufacturers. The automobiles which are ordered from the manufacturers by the distributors for themselves and their associated dealers are shipped directly to the respondents. Title to the automobiles remains in the manufacturers until the respondents take delivery in Providence. The automobiles which are delivered by the manufacturers to the respondents are transported by railroad or truck from the factories in Michigan to Providence. From the railroad station in Providence the automobiles are driven to the respondents' places of business by their employees.

There, the automobiles are serviced by respondents' employees and made ready for delivery to individual purchasers or dealers. The sales prices of new cars established by the respondents, or their dealers, are based upon the manufacturers' list prices, and to further the sale of automobiles the manufacturers advertise in local newspapers and list the names of the respondents and their dealers. Both the manufacturers and distributors also take an active part through sales conferences in promoting the business of their dealers. The dealers buy their cars from the distributors and take delivery in Providence.

The pecuniary value of the business done by each respondent was considerable, ranging approximately from $700,000 to $1,500,000. During the period between January 1, 1938 and June 1, 1939, the respondent, Henry Levaur, Inc., purchased new cars of the value of $1,169,000. 100 per cent of these were shipped to him in interstate commerce. During the same period he exchanged with other dealers new cars, 60 per cent of which were received from dealers outside of the State of Rhode Island. 4 per cent of the used cars acquired by the respondent during the same period were received from points outside of the State, and 100 per cent of the parts and accessories were shipped from points beyond Rhode Island. 10 per cent of the new cars which the respondent sold was sold to persons or dealers outside of Rhode Island as was 60 per cent of the new cars exchanged with other dealers. 2½ per cent of the used cars sold by the respondent were sold to persons or dealers outside of the state.

A similar picture is presented by the business of the respondent Bradburn Motors Co., as the evidence showed that 97 per cent of the new cars purchased, 100 per cent of the new cars received in exchange, 100 per cent of the parts and accessories purchased, and 3 per cent of the used cars acquired, came from outside the state while 10 per cent of

the new cars sold, 60 per cent of the new cars exchanged, and 2½ per cent of the used cars sold went to purchasers or dealers having residences or places of business in states adjacent to Rhode Island.

The respondent, Colt-Brady Co., received 100 per cent of its new cars purchased, 100 per cent of its new cars received in exchange, and all its parts and accessories purchased from points without the state; and sold 5 per cent of its new cars to purchasers or dealers in states other than Rhode Island. 100 per cent of the new cars which it exchanged with other distributors, 5 per cent of its used cars sold, and 1 per cent of its parts and accessories went to out of state purchasers.

The respondents contend that they are not engaged in interstate commerce or do not so affect such commerce as to bring them under the National Labor Relations Act. To support this contention they present several arguments. They insist that their business is predominantly an intrastate retail business, that their interstate transactions are very small percentages of their total business, that they do not take title to the automobiles shipped in interstate commerce until they arrive within Rhode Island, and that they relinquish title to the purchaser before the car leaves the State. This, they claim, makes even their transactions with out of state vendors and purchasers completely intrastate sales and removed from the regulatory power of Congress.

We cannot agree with the respondents. It seems clear that they are engaged in interstate commerce and that any stoppage of their businesses because of their unfair labor practices would obstruct or burden the free flow of such commerce. The decided cases have rejected all of the respondents' contentions.

It has long been settled that activities which when separately considered are intrastate may become subject to the power of Congress when they have a close and substantial relation to interstate commerce. *Consolidated Edison Co.* v.

National Labor Relations Board, 305 U.S. 197 (1938); *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U.S. 453 (1938); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. (2d) 198 (C.C.A. 9th, 1939). The respondents clearly fall within this conception for not only do they receive all of their new inventory from out of the state but they make sales, not only to casual out of state purchasers, but to appointed dealers in states other than Rhode Island. These dealers are within the designated sales area of the respondents, are bound by contract to do business with the manufacturer through the respondents, and are in many ways tied to them. The contention that an interference with the business of any one of the respondents would not affect interstate commerce is plainly untenable. A labor dispute which would curtail the sales of respondents would cut down the percentage sold to out of state purchasers or dealers, would prevent the free exchange of new cars, and would affect the receipt of automobiles from the manufacturer. Clearly such curtailment affects interstate commerce.

We do not rely on the fact that 100 per cent of respondents' purchases of new cars are shipped to respondents from without the state, though there is considerable authority that that fact alone would be sufficient to subject respondents to the National Labor Relations Act. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841 (C.C.A. 4th, 1939), rev'd on other grounds, 308 U.S. 241 (1939); *National Labor Relations Board* v. *Norfolk Shipbuilding & Dry Dock Corp.,* 109 F. (2d) 128 (C.C.A. 4th, 1940); *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951 (C.C.A. 4th, 1938); *cf. Santa Cruz Co.* v. *National Labor Relations Board, supra.*

Laying aside any consideration of the source of the automobiles sold by the respondents, they are still deliberately engaged in interstate transactions with associated dealers. *Santa Cruz Co.* v. *National Labor Relations Board, supra*; *cf. Consolidated Edison Co.* v. *National Labor Relations Board, supra.* Respondents are integral parts in the distribution of automobiles in interstate commerce and maintain contractual connections with out of state dealers to further interstate sales. *Cf. Carter Carburetor Mining Corp.* v. *Federal Trade Commission,* 112 F. (2d) 722 (C.C.A. 8th, 1940). No "flow" of interstate commerce is necessary to subject an enterprise to the National Labor Relations Act since burdens on such commerce can result from intrastate acts irrespective of the origin of the materials or the place where the sale is made. *Clover Fork Coal Co.* v. *National Labor Relations Board,* 97 F. (2d) 331 (C.C.A. 6th, 1938).

It is not in the least significant that the sales are so made that title passes to the purchaser within Rhode Island. It has long been held that a sale involving interstate transportation is not removed from Congressional regulation because the sale itself is intrastate, either before or after the transportation. *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50 (1922); *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282 (1921). This reasoning has been explicitly applied to jurisdiction under the National Labor Relations Act, the Supreme Court saying "And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce". *Santa Cruz Co.* v. *National Labor Relations Board, supra,* at page 465. See also *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601 (1939); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra*; *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780 (C.C.A. 9th, 1940); *cf. Carter Carburetor Mining Corp.* v. *Federal Trade Commission, supra.*

The fact that the interstate transactions of the respondents are only a small percentage of the entire business of respondents is not material since the test of applicability of the National Labor Relations Act is not the percentage of business done but the effect on interstate commerce. *Santa Cruz Co.* v. *National Labor Relations Board, supra*; *National Labor Relations Board* v. *Fainblatt, supra*; *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38 (C.C.A. 6th, 1940); *Southern Colorado Power Co.* v. *National Labor Relations Board,* 111 F. (2d) 539 (C.C.A. 10th, 1940).

Finally, respondents contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce, and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption. Such contentions have no merit and have previously been denied. *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U.S. 318, 326 (1940); *Southern Colorado Power Co.* v. *National Labor Relations Board, supra; North Whittier Heights Citrus Assoc.* v. *National Labor Relations Board,* 109 F. (2d) 76, 81-82 (C.C.A. 9th, 1940); *cf. Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 557 (1937); *McCall* v. *California,* 136 U.S. 104, 111 (1890). Since the purpose of the Act is to protect interstate commerce from disruption, Congress can act before the disruption occurs to prevent unfair labor practices if they would tend to lead to labor disputes which threaten to obstruct interstate commerce. *National Labor Relations Board* v. *Bradford Dyeing Association, supra*; *Consolidated Edison Co.* v. *National Labor Relations Board, supra*; *Clover Fork Coal Co.* v. *National Labor Relations Board, supra.* If the Board can act before any disruption occurs, it would indeed be a strange situation if an employer could obtain immunity from the jurisdiction of the Board by provoking a labor dispute and

securing its settlement before it affected the interstate commerce involved. Thus, the respondents' contention that the failure of the strike to affect interstate commerce prevents attachment of the Board's jurisdiction must be rejected.

Respondents, disregarding their interstate purchases, are engaged in the interstate sale of automobiles both to individual customers and to contractually associated dealers in states other than Rhode Island. We hold that their unfair labor practices might lead or tend to lead to labor disputes which threaten to obstruct such interstate transactions. In such circumstances the respondents are clearly subject to the jurisdiction of the National Labor Relations Board which properly entered the order agreed upon by the parties in their stipulations. The Board's petition for enforcement is, therefore, granted, and a decree will be entered enforcing the order of the Board.

Petitioners' Contentions.

1. The Congressional power granted by Congress to the National Labor Relations Board through the National Labor Relations Act does not grant to the National Labor Relations Board the power to regulate interstate commerce (Supporting Brief, *infra*, p. 23).

2. The Congressional power granted, through the National Labor Relations Act to the National Labor Relations Board, only extends to situations and matters which have an effect upon commerce within the meaning of the National Labor Relations Act (Supporting Brief, *infra*, pp. 24, 25, 26).

3. As to the view adopted by the learned Circuit Court of Appeals to the effect that "we do not rely on the fact that 100% of the respondents' [petitioners' here] purchases of new cars are shipped to respondents [petitioners here] from without the state, though there is considerable

authority that that fact alone would be sufficient to subject respondents [petitioners here] to the National Labor Relations Act," *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841 (C.C.A. 4th, 1939), rev'd on other grounds, 308 U.S. 241 (1939); *National Labor Relations Board* v. *Norfolk Shipbuilding & Dry Dock Corp.,* 109 F. (2d) 128 (C.C.A. 4th, 1940); *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951 (C.C.A. 4th, 1938); cf. *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U.S. 453; it appears that the learned Circuit Court of Appeals has made no attempt to apply the facts in the cases at bar to the law involved, as hereinafter set forth in detail (Supporting Brief, *infra,* pp. 26-27).

4. The learned Circuit Court of Appeals has also adopted a peculiar view to the evidence inasmuch as they state "respondents [petitioners here] contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce, and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption." This view is not supported by the evidence in the cases at bar (Supporting Brief, *infra,* p. 26).

5. Since the purpose of the Act is to protect interstate commerce from disruption, Congress can act before the disruption occurs to prevent unfair labor practices if they would tend to lead to labor disputes which threaten to obstruct interstate commerce; *National Labor Relations Board* v. *Bradford Dyeing Association, supra*; *Consolidated Edison Co.* v. *National Labor Relations Board, supra*; *Clover Fork Coal Co.* v. *National Labor Relations Board, supra*; but such an act by the Board must be based upon the facts in the individual cases before it, and the evidence must support a finding in the instant matters that the alleged unfair labor practices complained of would tend to lead to labor disputes which threaten to obstruct interstate commerce.

In the absence of such evidence, and the petitioners herein contend the evidence to be contrary to the findings made, the Congressional power granted through the National Labor Relations Act to the National Labor Relations Board has been exceeded (Supporting Brief, *infra*, pp. 27-28).

6. It is the contention of the petitioners that, unless they hire, operate, or control agents or agencies to transmit goods or merchandise to the several States, they are not engaged in interstate commerce within the meaning of the National Labor Relations Act, and the mere purchase of articles for resale from the several States does not *per se* make the purchaser thereof directly or indirectly engaged in interstate commerce (Supporting Brief, *infra*, pp. 28-29).

Reasons for Granting the Writ.

The Congress of the United States, which has the power to regulate interstate commerce, has delegated certain of its regulatory powers through the National Labor Relations Act to the National Labor Relations Board. The power thus delegated to the Board grants to it such powers as Congress itself has to regulate certain unfair labor practices which have an effect upon interstate commerce. If it were sufficient for the Board to assume jurisdiction over the petitioners by reason of the fact that they made purchases from the various States of their commodity, which they resold in their own State, then it must necessarily be assumed that, without more, Congress had intended to grant to the National Labor Relations Act, and through it to the National Labor Relations Board, the power to regulate interstate commerce. This, by the decided cases, is not so. Therefore the only Congressional power that extends to the National Labor Relations Board by virtue of the provisions

of the National Labor Relations Act is unfair labor practices which lead or tend to lead to labor disputes which threaten to obstruct interstate commerce. The petitioners maintain that the evidence in the cases before the learned Circuit Court of Appeals is controlling, and since the evidence before the Court was that the unfair labor practices *resulted* in a labor dispute, and that said labor dispute *did not threaten* or obstruct such interstate commerce, an assumption of non-existing facts as to what might happen in the future under different circumstances and conditions was an erroneous one, and that the jurisdiction of the National Labor Relations Board has failed to attach to the instant cases on the evidence in the record as presented. The contention of the learned Circuit Court of Appeals, "thus the respondents' [petitioners' here] contention that the failure of the strike to effect interstate commerce prevents attachment of the Board's jurisdiction must be rejected," is not consistent with the intent of Congress and is without merit.

If the several States are not enlightened as to whether or not the Congressional power under discussion here extends to labor disputes which do not affect or threaten to obstruct interstate commerce, it is reasonable to assume that many conflicting decisions will arise by reason of the ambiguity of the language in the decided cases, particularly since the several Circuit Courts of Appeals have shown an apparent willingness to decide these cases, as well as others, on the dicta of this Court.

As a further reason for the granting of the writ, your petitioners respectfully urge that certiorari might well be granted by this Court almost as a matter of course to review judgments of the Circuit Court of Appeals in cases which, like these, bring forth an issue which is the vital purpose of the National Labor Relations Act, and which no longer affects manufacturers and processors, but as in these cases

extends also to retail establishments selling nationally advertised products and commodities within certain territories, and thus, by the process of elimination and the misinterpretation of dicta in the decided cases, might, if allowed to be extended further, do away with intrastate commerce.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the several States, as well as the public, may know the true intent of Congress on the questions as presented, and that to such end a writ of certiorari should be granted, and this Court should review the Decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

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